93-574

OCT - 8 1993

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NELSON RAMIREZ GONZALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals, by affirming the Medicare fraud conspiracy conviction of Petitioner, has sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court because the evidence relied upon consisted of improper inferences.

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. United States of America, Appellee
2. Betty Jo Bertoncini, Appellant
3. Nelson Ramirez-Gonzalez, Appellant

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed issued on May 12, 1993, has not reached the Federal Reporter System; it is docketed as Case No. 90-4088 in the United States Court of Appeals for the Eleventh Circuit (A 1-2); the accompanying opinion was entered the same day under the same style and number (A 3-6).

The prior withdrawn opinion was entered under that same style and number on February 24, 1993 (A 7-10).

STATEMENT OF GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals on the 12th day of May 1993 (A 1-2).

The judgment sought to be reviewed was entered on rehearing wherein the original opinion and judgment were withdrawn.

By order of Justice Anthony M. Kennedy dated the 10th day of August, 1993, the time for filing this Petition of Writ of Certiorari was extended to and including October 8, 1993.

28 U.S.C. §1254 confers jurisdiction on this Court to review criminal convictions out of United States Courts of Appeals.

CONSTITUTIONAL AND

STATUTORY PROVISIONS INVOLVED

Constitutional

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall nay person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for ones public use, without just compensation.

Statute

Title 18 U.S.C. §371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

The United States District Court, Middle District of Florida, was the Court of first instance. It had jurisdiction under Title 18 U.S.C. §3231.

DR. RAMIREZ was born in Cuba on January 28, 1941, and began his medical training there but completed it in three years in Madrid, Spain, from 1971 to 1973 (A 12).

He became licensed to practice medicine in Florida in 1976 and began a general practice involving both house calls and office practice, treating mostly elderly people (A 12-13).

DR. RAMIREZ first became acquainted with the TENS unit through a Mr. Cuerto of a medical supply company known as Duramedic (A 16-17). The TENS equipment (transcutaneous electrical nerve stimulator) operates to block certain pain nerve impulses to the brain to alleviate pain (A 22-28). It is not known why it works (A 28-29).

Through that meeting, he met Defendant, MORA, who later started his own company, Defendant, OSMOMEDIC (A 18, 38).

MORA, or one of his sales people, would give DR. RAMIREZ the names of prospective TENS patients and he would examine them to see if the use of the TENS unit was indicated (R5 6-8).

DR. RAMIREZ did not receive remuneration from MORA or any medical equipment provider he was connected with (A 36). MORA testified DR. RAMIREZ billed Medicare directly for his services (A 36).

There were a substantial number of patients that DR. RAMIREZ examined for whom he refused to prescribe a TENS unit (A 44, 20). MORA did testify that DR. RAMIREZ would sign prescription forms for specific patients for him for TENS units in blank and that he wanted MORA and OSMOMEDIC to provide five patients per day and he would only see MORA's referred patients (A 43, 31).

RAMIREZ was charged in Counts 1, 2, 3, 4, 5, 6, 7, 12, 15, 16, and 17 of a 29-Count indictment on 28 February 1990, in Tampa, Florida.

DR. RAMIREZ was found guilty in Counts One, Two, Three, Six, Seven, Twelve, Fifteen, Sixteen, and Seventeen but not guilty in Counts Four and Five (R11 14-16).

On November 9, 1990, DR. RAMIREZ was sentenced to imprisonment for thirty-seven months with three years of supervised probation thereafter (R12 10-11) and on December 14, 1990, he was released on bail pending the outcome of this appeal (R2 175 1-2).

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT

The Government characterized the conspiracy throughout (Count One) as follows:

> . . . testimony of Oswaldo Mora showed that Dr. Ramirez-Gonzalez willfully became a member of a conspiracy designed to sell TENS units at the expense of Medicare and Medicaid. Mora and Dr. Ramirez-Gonzalez entered into an explicit arrangement in which Mora's company would find the patients and Dr. Ramirez-Gonzalez would prescribe TENS units.

(Government's Brief pp. 22-23
In the Court of Appeals)

A reading of the referenced portion of the record does not support this assertion.

There is a perfectly legal interpretation of the alleged explicit arrangement and that is that Dr. Ramirez would only prescribe medical equipment from Mr. Mora's company and then only when necessary. The Court of Appeals rejected such evidence in support

of a conspiracy in *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989). In that case the Court of Appeals reversed a similar "wheel type" conspiracy conviction, stating:

> The Government sought to prove a "wheel" conspiracy with Miguel, the hub from which two spokes extended."
>
> (Citation omitted.)

Then, quoting with approval from *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), the Court went on:

> "For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. *Blumenthal v. United States*, 332 U.S. 539, 556-57, 68 S.Ct. 248, 256-57, 92 L.Ed. 154 (1947)."

The entire record is devoid of any evidence that Petitioner here knew Dr. Bertoncini, a co-defendant below. In *Fernandez*, *supra*, the Court concluded:

> Accordingly, the evidence of the meeting at Miguel's home shows a discussion susceptible of either an

illegal or legal interpretation, and as such cannot be used to establish a conspiracy.

In fact, mention of TENS units is by Mr. Grosso, the prosecutor, who asked Mr. Mora, a co-conspirator, how many of such units Dr. Ramirez prescribed; not, if such prescriptions for each patient produced was part of the agreement.

Indeed, Mora having entered a plea and testifying for the Government stated on examination by the Government:

> Q. Did Dr. Ramirez ever refuse to sign an RX-1 or RX-2 prescription form?
>
> A. Yes. Many times he refused patients that did not need the unit.
>
> (A 44)
>
> * * *
>
> Q. Was there ever a time when Dr. Ramirez did not prescribe something for a patient?
>
> A. Well, when Dr. Ramirez would see that there was no necessity for anything, he would not prescribe.
>
> (A 44)

Obviously, the Government did not like this testimony but now elects to ignore it. On page 23 on the Government's brief is found the following assertion:

> The evidence showed a pattern: When a TENS salesperson referred a patient to Dr. Ramirez-Gonzalez, Dr. Ramirez-Gonzalez inevitably prescribed a TENS unit.
>
> (Emphasis supplied.)
>
> (Government's Brief, page 23, in the Court of Appeals.)

It is apparent from the above quoted portions of the record that often Dr. Ramirez did not even accept patients referred to him. Mr. Mora said:

> . . . many times he refused patients . . .

This, of course, would result in no file being opened and no record.

Nonetheless, the Government submitted as compelling that:

> A summary of Dr. Ramirez-Gonzalez records and those of Osmomedic, Duramedic, and Ultimate showed that of 171 patients referred to Dr. Ramirez-Gonzalez by Osmomedic and other medical equip-

ment companies, Dr. Ramirez-Gonzalez prescribed 151 TENS units. Exhibit 58.

(Government's Brief p. 13 in the Court of Appeals)

This was misleading. If, for instance, the unknown number of patients refused were 150, the Government's numbers are of little consequence in demonstrating that Dr. Ramirez inevitably prescribed TENS units for patients referred to him.

The Government did not prove the conspiracy!

In opposition to Dr. Ramirez' claim that he only exercised poor judgment, the Government stated that:

> The evidence showed a pattern; When a TENS salesperson referred a patient to Dr. Ramirez-Gonzalez, Dr. Ramirez-Gonzalez inevitably prescribed a TENS unit. This consistency rebuts Dr. Ramirez-Gonzalez' claim that the false statements an unnecessary medical equipment were the product of poor medical judgment.
>
> (Emphasis supplied.)
>
> (Government's Brief, p. 23, in the Court of Appeals.)

When properly viewed in light of legally acceptable proofs, no inference of a conspiracy can be drawn and remain consistent with the Fifth Amendment.

The Court is requested to take jurisdiction.

Respectfully submitted,

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93-574

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-4088

District Court Docket No. 90-00057-CR-T-15

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NELSON RAMIREZ-GONZALEZ, BETTY JO BERTONCINI,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, Chief Judge, and EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

JUDGMENT ON REHEARING

This cause came to be heard on Plaintiff-appellee's petition for rehearing;

UPON CONSIDERATION WHEREOF, it is now hereby ordered that the Court now withdraws the opinion and judgment entered on February 24, 1993; and it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause as to defendant-appellant Ramirez-

Gonzalez be and the same is hereby AFFIRMED; that the judgment of conviction as to defendant-appellant Bertoncini on Count 13 is hereby REVERSED and on Counts 9, 11, 18-29 is AFFIRMED; and that the enhancement of the sentence imposed by the District Court by two points for obstruction of justice is hereby AFFIRMED.

Entered: May 12, 1993
For the Court: Miguel J. Cortez, Clerk

by: _____
Deputy Clerk

ISSUED AS MANDATE: Aug 02 1993 [STAMPED]

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-4088

District Court Docket No. 90-00057-CR-T-15

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NELSON RAMIREZ-GONZALEZ, BETTY JO BERTONCINI,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(May 12, 1993)

ON PETITION FOR REHEARING

Before TJOFLAT, Chief Circuit Judge, and EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIUM:

The Government's Petition for Rehearing is granted. The opinion in this case rendered on February 24, 1993 is withdrawn. We substitute the following opinion:

The conviction of Nelson Ramirez-Gonzalez is Affirmed: See 11th Cir. Rule 36-1.

Betty Jo Bertoncini, who was charged and tried together with appellant Ramirez-Gonzalez, was found guilty of mail fraud, in violation of 18 U.S.C. §1341; making and causing to made false, fictitious and fraudulent statements of material facts on RX-2 prescription forms, in violation of 18 U.S.C. §1001; filing false claims, in violation of 18 U.S.C. §287; and receiving kickbacks, in violation of 42 U.S.C. §1320a-7b(b)(1). A mistrial as declared on the conspiracy charge for Bertoncini. The issue is whether there was sufficient evidence to support Bertoncini's conviction.

In judging whether the evidence is sufficient to support the jury's verdict, the appropriate standard of review is whether the evidence, when considered in the light most favorable to the government, proves the defendant guilty beyond a reasonable

doubt. United States v. Sanchez, 722 F. 2d. 1501, 1505 (11th Cir.), cert. denied, 467 U.S. 1208 (1984).

The fraudulent scheme was devised by Oswaldo Mora and Osmomedic, Inc. for the purpose of filing false Medicare claims. Osmomedic supplied a pain-blocking device known as a Transcutaneous Electrical Nerve Stimulation ("TENS") unit. The RX-2 prescription forms submitted to the government by Osmomedic for payment contained false information regarding the required 30-day trial period to establish the effectiveness of the TENS unit for each patient for whom it was prescribed. Osmomedic received payment for supplying this medical equipment prescribed as a treatment for chronic pain. Mora and Osmomedic entered guilty pleas.

Bertoncini is a medical doctor. Under Medicare, a prescribing physician must indicate on the RX-2 form the medical necessity of durable medical equipment. Forms were filled out, in part, by Bertoncini when she prescribed TENS unit for patients who were referred to her by Osmomedic. These forms were delivered to Bertoncini's office and picked up for later filing by an Osmomedic employee. Osmomedic handled every aspect of the filing procedure.

Bertoncini testified that she did not sign the forms, and a handwriting expert testified that the signature, which was the basis for the charges in Count 13, was not hers. The government concedes that Bertoncini did not sign these forms.

There was no showing to support the element of knowledge by Bertoncini with reference to submitting false claims. Her conviction on Count 13 is reversed.

The conviction of Bertoncini on Counts 9, 11, 18-29 is Affirmed. See 11th Cir. Rule 36-1. The enhancement of the sentence by two points for obstruction of justice is affirmed.

Affirmed in Part, Reversed in Part.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-4088

District Court Docket No. 90-00057-CR-T-15

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NELSON RAMIREZ-GONZALEZ, BETTY JO BERTONCINI,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(February 24, 1993)

Before TJOFLAT, Chief Judge, and EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIUM:

The conviction of Nelson Ramirez-Gonzalez is Affirmed: See 11th Cir. Rule 36-1.

Betty Jo Bertoncini, who was charged and tried together with appellant Ramirez-Gonzalez, was convicted of offenses related to a Medicare fraud and kickback scheme. For the reasons which follow, the conviction of Bertoncini is Reversed.

Bertoncini was found guilty of mail fraud, in violation of 18 U.S.C. §1341; making and causing to made, false, fictitious and fraudulent statements of material facts on RX-2 prescription forms, in violation of 18 U.S.C. §1001; filing false claims, in violation of 18 U.S.C. §287; and receiving kickbacks, in violation of 42 U.S.C. §1320a-7b(b)(1). A mistrial as declared on the conspiracy charge for Bertoncini. The issue is whether there was sufficient evidence to support Bertoncini's conviction.

In judging whether the evidence is sufficient to support the jury's verdict, the appropriate standard of review is whether the evidence, when considered in the light most favorable to the government, proves the defendant guilty beyond a reasonable

doubt. United States v. Sanchez, 722 F.2d 1501, 1505 (11th Cir.), cert. denied, 467 U.S. 1208 (1984).

The fraudulent scheme was devised by Oswaldo Mora and Osmomedic, Inc. for the purpose of filing false Medicare claims. Osmomedic supplied a pain-blocking device known as a Transcutaneous Electrical Nerve Stimulation ("TENS") unit. The RX-2 prescription forms submitted to the government by Osmomedic for payment contained false information regarding the required 30-day trial period to establish the effectiveness of the TENS unit for each patient for whom it was prescribed. Osmomedic received payment for supplying this medical equipment prescribed as a treatment for chronic pain. Mora and Osmomedic entered guilty pleas.

Bertoncini is a medical doctor. Under Medicare, a prescribing physician must indicate on the RX-2 form the medical necessity of durable medical equipment. Forms were filled out, in part, by Bertoncini when she prescribed TENS unit for patients who were referred to her by Osmomedic. These forms were delivered to Bertoncini's office and picked up for later filing by an Osmomedic employee. Osmomedic handled every aspect of the filing procedure.

Bertoncini testified that she did not sign the forms, and a handwriting expert testified that the signature was not hers. The government concedes that Bertoncini did not sign these forms.

There was no showing to support the element of knowledge by Bertoncini with reference to submitting false claims. It follows that the conviction must be reversed.

REVERSED.

EXCERPT FROM R-8

- Pg. 90 -

* * *

. . . calls?

A. Yes sir.

Q. Was it sent out after he became indicated?

A. Yes sir.

MR. KINNEY: Thank you.

MR. JOHANSSEN: No additional questions, Your Honor.

THE COURT: You may come down, Mrs. Ramirez, thank you.

(Witness excused.)

THE COURT: Your next witness, Mr. Kinney.

MR. KINNEY: Call the defendant, Dr. Ramirez.

(The Witness was Sworn.)

THE CLERK: Please state your full name and spell you last for the record.

THE WITNESS: Nelson M. Ramirez-Gonzalez, R-a-m-i-r-e-z.

DIRECT EXAMINATION

BY MR. KINNEY:

Q. Doctor, will you speak loud enough so that I can hear you.

A. Okay.

Q. In what country were you born?

A. In Cuba.

Q. What is your date of birth?

A. January 28, 1941.

Q. What schooling did you have in Cuba?

A. All of my elementary education and half of my secondary education.

Q. Did you receive your medical training in Cuba?

A. Part of that.

Q. And where did you receive the balance of your training?

A. In Spain.

Q. What city in Spain?

A. In Madrid.

Q. And how many years did you spend in Spain in medical school?

A. Three years.

Q. What years were they?

A. '71, '72 and '73.

Q. In what year did you come to the United States?

A. 1975.

Q. And when you came to the United States, did you make your application to practice medicine in the United States?

A. Yes sir.

Q. And did you take an examination to become a doctor licensed in the State of Florida?

A. Yes sir.

Q. And in what year did you take that examination?

A. 1976.

Q. And in what year were you licensed to practice in the State of Florida?

A. The same year, 1976.

Q. And before being licensed in 1976, did you have to serve an internship at a hospital in Florida?

A. Yes sir, at the Jackson Memorial Hospital in Miami in 1975.

Q. After being licensed to practice, in what city did you start to practice?

A. In Miami.

Q. And in what type of practice did you conduct your profession?

A. General medicine.

Q. Did you in the initial starting of your practice make house calls and do office visits?

THE INTERPRETER: What's the other question, sir?

THE COURT: Read the question back.

(The question was read.)

A. Yes sir. I would visit both. I will have a combination of visits to homes, home calls, and also visits to the office because the majority of my patients were elderly people or elderly patients.

Q. During the years of 1982, '83, '84 and '85, was that still your practice that you did some house calls and some office practice?

A. Yes sir.

Q. And the year 1986 also?

A. Yes sir. At that year I determined to limit my practice to the visiting homes. I limited my practice to the domicile home.

MR. KINNEY: May I approach the witness?

THE COURT: You may.

BY MR. KINNEY:

Q. I'm showing you Exhibits Number 2, Number 3, Number 4, Number 5 and number 6, and ask you if you recognize those exhibits?

A. Um-hum, yes.

Q. Do those exhibits cover the years 1982, 3, 4, 5 and 6?

A. And 6.

Q. Do those exhibits show a breakdown of what visits were at home and what visits were at an office?

A. Yes sir.

Q. And how are those visits distinguished?

A. Can I touch them?

Q. For example, does each place, for example, the home, the office and hospital, have a different designated number?

A. Yes sir.

Q. And what is the number on the billing there for a house visit?

A. There is a code on the back of the page that shows, for . . .

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* * *

. . . would not pay house-call visits to doctors that are not enrolled for that institution, but I didn't know nor the patient.

Q. Did there come a time in January of 1988 that you had a meeting with a Mr. Cuerto?

A. Yes sir.

Q. And where did this meeting take place?

A. In my home.

Q. Did you know Mr. Cuerto before that meeting?

A. No sir.

Q. Did he call you first on the telephone before coming to your home?

A. Yes sir. He made an appointment.

Q. And when he came to your home to see you, what did he talk to you about?

A. He showed me this new equipment for pain that is called TENS.

Q. Did he bring with him a TENS unit?

A. Yes sir.

Q. Did he bring with him any literature about the TENS unit?

A> Yes. He left me a booklet.

Q. Did he discuss the TENS unit and its purpose with you?

A. Yes sir.

Q. What did he want you to do?

A. He wanted me to consider that as part of the treatment and he visited me and I have been visited or they continued visiting me by many medical representatives introducing their medical products so that I may consider them.

Q. What company was Mr. Cuerto representing?

A. A company called Duramedic.

Q. Did he tell you that he would be back in touch with you?

A. Maybe he said that.

Q. I didn't hear you?

A. Maybe. Yes. I think so.

Q. Did Mr. Cuerto visit you again?

A. NO. Not anymore.

Q. Did he make arrangements for another representative of his company to visit you?

A. Yes, telephonically he made arrangements.

Q. And what was the name of the representative?

A. Oswaldo Mora.

Q. How much time was there between the visit of Mr. Cuerto and the visit of Mr. Mora?

A. Approximately a month.

Q. And did you receive a telephone call from Mr. Mora?

MR. GROSSO: Objection, Your Honor. These are leading.

THE COURT: I think so, but I think we need to ...

- Pg. 104 -

* * *

. . . around, he can walk, he can do his usual labor, he can sleep. The only thing he cannot do is take a shower. And --

Q. The question --

A. -- this test can give more information with the patient in movement. And then I would have a better idea of how is functioning the heart of the patient.

Q. Did you feel that it was necessary in order to get a thorough result of the examination to do both the EKG and the Holter Monitor?

A. Could you repeat it again?

Q. I didn't hear you.

A. Could you repeat it again?

Q. Do you feel it was necessary in order to get a complete finding of the patient --

MR. GROSSO: Objection, Your Honor, this is a leading question.

THE COURT: Sustained.

BY MR. KINNEY:

A. Why did you do both the EKG and the Holter Monitor?

A. Because in my opinion, to be sure -- to be sure --

THE COURT: ON the safe side?

THE WITNESS: To be on the safe side, as well as for my patient, as for me as a doctor in which I am practicing medicine in a country in which lawsuits exist. I'm supposedly, according to what I know of the business, to do the best I can or to the best I know and offer it to my patient.

BY MR. KINNEY:

Q. Doctor, after you performed the examination and the EKG and the Holter Monitor, did you have any further contact with the representative of Duramedic or Osmomedic who had referred the patient to you?

A. h, yes.

Q. Did you after you made the examination make a recommendation, either yes or no, that the patient could use the TENS unit?

A. If they could use it, yes. And if they cannot, I would not prescribe it.

Q. In your discussion originally with Mr. Mora, was any mention made to you that he would pay for these examinations?

A. Never.

Q. Was there any discussion made by Mr. Mora that he had a plan to defraud the United States Government through Medicare examinations?

A. No.

MR. KINNEY: May I have a minute, Your Honor?

THE COURT: Yes.

MR. KINNEY: I have nothing further, Your Honor.

THE COURT: Cross-examination.

EXCERPT FROM R-7

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* * *

. . . unit because it has two channels, allows us to place four electrodes, two electrodes with the left channel, place A and B, and two electrodes that come out of the right channel, C and D we'll call them. This particular dual-channel unit allows you to treat a larger area or more area simultaneously than would a single-channel unit.

Q. I'm going to hand you some other items that were in that box, Government's Exhibit 25. Will you please tell us what these are?

A. Sure. This particular portion of the TENS device package are the electrodes, and as you can see, there is one jack that would go into the bottom of the unit on one side, like so, and then two separate jacks right here that would be attached to, and I'll show you those in just a second here, these devices right here. These are the conducting pads, if you will. I have to break that open. That's okay.

These particular conducting pads are made of rubber impregnated with carbon to enhance the electrical conductivity.

And clinically the way we use these devices is we takes these small electrodes, attach them to the dispersing pads. We would smear a little conductive jelly on the pad to make the transmission of current more effective, and then I would place these on the patient, for example, like here if I intended to treat an area around the elbow. I would secure these in place with adhesive tape or some sort of porous paper tape so the patient could wear these electrodes and carry the TENS unit because it has a belt clip around on his belt or her belt.

Q. Dr. Nolan, I have another chart here and this is marked for Identification purposes as Government's Exhibit Number 24. Is this an accurate representation of where on might place electrodes from a TENS unit in order to alleviate particular types of pain?

A. Yes. This chart -- I don't know if the jury can see it.

Q. There, now they can see it.

A. Yes. It is an accurate representation of a variety of electrode placement sites that have been used clinically for the treatment of several different kinds of pain.

MR. GROSSO: I would move Government's Exhibit Number 24 into evidence.

MR. KINNEY: No objection.

THE COURT: It is received.

BY MR. GROSSO:

Q. Dr. Nolan, this chart has four different types of pain indicated on it. Would you please describe for us just what these various representations are?

A. Sure. There are four sets of diagrams illustrated up here, one representing the electrode placement sites that might be useful if one were treating head and neck pain. This particular one would be more effective for neck pain rather than head pain. In this illustration we see the use of two electrodes so a single channel of the TENS unit would be required to power these two electrodes. In the illustration over here we see electrode placement sites, one at the shoulder and the arm on the front sides and one in the should and arm on the back side which might be used to treat shoulder or arm pain. With this setup, if we assume that this is the same individual, with four electrodes on this would require a dual channel unit like the one we have today.

This particular illustration over here shows two different methods for treating knee pain. This illustrates something some-

what different. In the illustration on the right we see that there are four electrodes placed in the near vicinity of the knee joint, and this is a feasible, if you will, or a vary reasonable choice of electrode placement sites for treating knee pain. An alternative to treat the knee pain, if we think for a moment about the mechanisms of pain transmission in the previous illustration that we had here, we know that the nerves that come from the knee have to get up to the spine, and so that the pain messages will travel from the knee to the spine and there to the brain, it has been tried and with some success to stimulate those nerves not close to where the pain is, but rather farther away in the region of the low back. So these are two different options that the health care provider might try with a patient that has knee pain to see which one, if either, might provide pain relief.

This particular illustration over here shows electrode placement sites for a single channel and a dual channel treatment setup for back pain or hip and groin pain. As is clear here on this side, this would be more ideal if the intent was to stimulate right over the hip joint or in the very close vicinity to the groin. Low back pain patients would probably receive electrical stimulation in

these two positions right here, and that's a very commonly used electrode placement site for patients that have acute or chronic low back pain.

Q. How does one determine for a particular patient the best placement of electrodes?

A. Currently, in current medical practice today it is essentially a trial and error method. There are a number of books out that illustrate suggested electrode placement sites, but there are no definitely proven sites for particular types of pain. So essentially we have to go through a trial and error period with the patient to establish which ones work for that patient.

Q. Now, going back to this device, number 25, Exhibit Number 25, I see here not only -- I see here an on and off switch and a number of numbers from 1 through 5. What does that indicate?

A. Okay.

These numbers on this TENS unit, this particular TENS unit, run from 1 to 5 and they are in equal increments. They are designed to allow you to select an intensity.

Q. What do you mean by intensity?

A. The output, how much current comes out of the electrodes into the skin, how much current in mili-amps that the patient receives, and to be able to document for a variety of purposes how much current the patient receives. The main reason for them in clinical practice, as it turns out, is because patients can't wear these electrodes all the time. They need to bathe and they need to change them and to take care of the skin beneath the electrodes so they don't get rashes and things like that, to be able to reset the TENS unit to the same level that was used before. Or conversely, if we find, for example, the treatment for a little while at 2 worked, it might need to be increased or decreased later on at some particular time to achieve the same level of pain relief.

Q. How would you know what the appropriate level is for a particular patient?

A. There is only one way to know that in my opinion and that is through a trial period where you apply the electrodes, turn on the current, ask the patient do they feel better and see if they get pain relief.

Q. Now, there is another know on that?

A. Yes. That's the knob on the top with the rectangles imprinted on it.

Q. What does that do?

A. Okay.

This changes the, what we call the rate of stimulus. It determines whether the patient feels the pulse at a bup, bup bup frequency or bup, bup, bup, bup, bup, bup or as a continuous buzz.

Q. Thank you. Why do TENS units work?

A. Why do TENS units work? The actual mechanism that produces pain relief by means of transcutaneous nerve stimulation is not known at the present time. There have been a number of clinical experiments and basic experiments done by basic scientists to try to evolve a series or the definitive reason they way TENS works, but to date we have not been able to come up with one single theory that describes how TENS works for a particular patient or a particular kind of pain.

Q. Are there multiple theories?

A. There are several theories that are well described in the literature today and that are used by health care providers in describing TENS to patients and in the literature.

Q. I'm now showing you what is marked for Identification purposes as Government's Exhibit Number 26. Is this a chart that you prepared?

* * *

BY MR. GROSSO:

Q. Is that the gentleman who stood, Mr. Mora?

A. Yes. The gentleman that stood up is Dr. Ramirez.

THE COURT: The record will reflect, then, that the witness has identified the defendant Ramirez.

BY MR. GROSSO:

Q. Mr. Mora, how many times did you accompany Dr. Ramirez on visits to patients?

A. Approximately some ten to twelve times.

Q. ON those occasions, what language did Dr. Ramirez speak to the patients?

A. Most of the Spanish -- excuse me. Most of the patients were of hispanic descent. He would speak to them in Spanish and they to him in Spanish.

Q. For those patients who spoke English, what language did Dr. Ramirez speak?

A. English.

Q. Was there any translator present during those conversations?

A. No.

Q. Did you have any kind of an arrangement with Dr. Ramirez for him to see your patients?

A. Yes.

Q. What was that arrangement?

A. The first agreement was that I met Mr. -- Dr. Ramirez through Mr. Cueto and Mrs. Alonzo. By telephone Dr. Ramirez asked me to find five patients per day, and he would only see my patients.

Q. When you say he would only see your patients, what was meant by that?

A. In other words, I would have to find five patients so that he would work exclusively for me.

Q. As opposed to who else, Mr. Mora?

A. Would you repeat that, please

Q. You said he would work exclusively for you. Who else was he working for at that time?

A. I am not -- I'm not cognizant of that. I believe for other companies.

Q. Did you and Dr. Ramirez enter into such an arrangement?

A. Yes, because I would find him -- did find him the five patients per day.

Q. When was the first time you met Dr. Ramirez?

A. I met him in the month of February of 1988.

Q. Where did you meet him?

A. I met him at the Hacienda Courts here in Ybor City.

Q. Why did you meet him there?

A. I found five patients for him, and I related that to him and therefore we got together that following morning at the Haciendas so that he could then examine the patients.

Q. What is the Hacienda?

A. It's an apartment complex where people that are retired live.

Q. Were the five patients for that day all residing in that apartment complex?

A. That day, yes.

Q. Did you accompany Dr. Ramirez on all his visit?

A. That day, no.

Q. Why not?

A. Because I had to continue looking for more patients for the following day.

Q. Did Dr. Ramirez ever express to you whether he wanted you to accompany him or he didn't want you to accompany him on other visits?

A. Yes. Many times he told me that he did not require my presence.

Q. How did you get the names and addresses of your patients to Dr. Ramirez?

THE INTERPRETER: I'm sorry, Counsel.

BY MR. GROSSO:

Q. How did you get -- how did you give the names and addresses of your patients to Dr. Ramirez?

A. At night by telephone.

Q. How many TENS units did Dr. Ramirez prescribe for your patients while you were working as a salesperson for Duramedic?

A. He prescribed approximately 150 units.

Q. Did Dr. Ramirez sign any RX-1 and RX-2 prescription forms?

A. Yes. He signed the RX-1 and the RX-2 units so that I could -- was able to receive my commission.

Q. When would he sign these prescription forms?

A. We would get together at a McDonalds or at a Wendy's once a week and he would sign them.

Q. Would he sign them in your presence?

A. Yes, in my presence.

Q. When he signed these forms, did he also fill out the section on the TENS questions?

A. No.

Q. Who would fill that out?

A. I had a sample that the company gave me with everything that had to be filled in an then the doctor only had to sign.

Q. Who would fill it in?

A. I would fill it in as a salesman.

Q. What did you put in for whether or not there had been a trial period?

A. Well, according to the sample that I had, we would use it a month before.

Q. Did you put a month in?

A. Yes. It would be according to the date that the doctor would see the patient.

Q. Was there, in fact, a trial period?

A. Well, that was a sample that I had, and I would go according to that sample.

Q. Was there a trial period for the patient before the prescription form was signed by Dr. Ramirez?

A. No. The doctor would sign and immediately would see the patient.

Q. Did Dr. Ramirez ever tell you to wait 30 days before presenting the prescription form to your company?

A. No.

Q. Did Dr. Ramirez ever discuss a trial period with you?

A. No. At no time.

Q. How is Dr. Ramirez reimbursed for his time spent visiting and examining patients?

MR. KINNEY: Objection, unless he knows.

THE COURT: Yes, you need to lay a predicate, Counsel.

BY MR. GROSSO:

Q. Mr. Mora, did you pay Dr. Ramirez anything for his time spent visiting and examining the patients?

A. No.

Q. Are you aware of how Dr. Ramirez was paid for his time spent visiting and examining patients?

A. Yes. He would have the patients sign a form so that then he could collect for Medicare.

Q. What was your commission from Duramedic?

A. When I first began $80, then it was increased to $120, and little by little it was increased.

Q. When would you get your commission?

A. 15 days after having given the applications to Mr. Cueto.

Q. Would Duramedic wait until the end of the trial period before paying you your commission?

A. Well, I don't know because I was not part of the office daily work.

Q. that was while you worked for the office in Brandon; is that correct?

A. Yes. I would give it to Mr. Cueto, who was in charge.

Q. Mr. Mora, was there a time when you became an office manager for Duramedic?

A. Yes.

Q. When was that?

A. Approximately a few months after working with Mr. Cueto I had a telephone conversation with Mr. Lopez, vice-president of Duramedic.

Q. Where was Mr. Lopez located?

A. In Miami.

Q. As a result of that conversation, what did you do?

THE INTERPRETER: He or the gentleman?

BY MR. GROSSO:

* * *

A. Secretary.

Q. When you started, how many sales people did you have?

A. Only Mr. Messaria.

Q. How long did you remain with Duramedic after opening this branch office?

A. Approximately two or three months.

Q. Who did you work with as your medical doctor during this time?

A. During that period of time, up to the that time only with Dr. Ramirez.

Q. Was there a time when you started your own company, Mr. Mora?

A. After finishing with Duramedic, I started with Ultimate.

Q. Could you pronounce that word one more time.

THE INTERPRETER: The last one?

A. Ultimate. U-l-t.

Q. Is that Ultimate Medical Services?

A. Yes, and they are also medical equipment.

Q. Why did you begin working with Ultimate Medical Services?

A. Because Mr. Lopez did not --

THE INTERPRETER: Excuse me, Counsel.

A. As far as the expenses that were to be paid, Mr. Lopez did not -- we did not come to the same agreement.

Q. How much of a commission did Ultimate Medical Services pay you, Mr. Mora?

A. $255.

Q. Why did they pay you that much money, Mr. Mora?

A. Because I had a good business with them.

Q. Did you have people working for you?

A. Yes.

Q. How much did you pay the people working for you out of this $250?

A. 200, 220.

Q. Was there a time when you opened your own company?

A. Yes.

Q. When was that?

A. Approximately June of 1988.

Q. Whey did you open your own company?

A. Because I had worked with Duramedic and Ultimate and I saw that it was a fantastic business.

Q. Do you obtain a provider number for Medicare?

THE INTERPRETER: I'm sorry, sir.

BY MR. GROSSO:

Q. Did you obtain a supplier number for Medicare?

A. Yes.

MR. GROSSO: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. GROSSO:

Q. Mr. Mora, I've just handed you what is marked for Identification purposes as Government's Exhibit Number 17. I'm going to ask you to examine it for a moment. Do you recognize that document, Mr. Mora?

A. Yes.

Q. What is it?

A. This was the letter sent to Jacksonville so that they would give me my provider number.

Q. Was that sent by your company?

A. No. This was sent by a professional, the accountant, James Jimenez.

Q. Who told the accountant to send that letter?

A. Well, I.

MR. GROSSO: I would move Government's Exhibit Number 17 into evidence.

THE COURT: Any objection, Counsel?

MS. MAYE: No objection.

THE COURT: It is received.

BY MR. GROSSO:

Q. Did you get a Medicare provider or supplier number after that?

THE INTERPRETER: Can you repeat the question, Counselor?

BY MR. GROSSO:

Q. Did you get a Medicare provider number?

A. Yes.

Q. When you started Osmomedic, how many sales people did you have working for you?

A. Approximately 45 salesmen.

Q. When you started, Mr. Mora?

A. When I started Osmomedic approximately 6 or 7 salesmen.

Q. How many did you have when you closed Osmomedic?

A. 45 and some left. Due to the investigation, when it was going to close, a lot of them left the company.

Q. When was that, Mr. Mora?

A. The investigation began in September of 1988.

Q. Mr. Mora, how much did you bill Medicare for the TENS units supplied by your company to patients?

A. $675.

Q. How much would Medicare pay your company?

A. 80 percent, $484.

Q. How much did these TENS units cost your company, Mr. Mora?

A. $70 per unit.

Q. From whom did you buy these TENS units?

A. A company named Biomedic from California, Los Angeles, California.

MR. GROSSO: May I approach the witness, Your Honor?

* * *

A. Through Ms. Angelita Cruz I met Dr. Bertoncini, female.

THE INTERPRETER: He uses the word doctora.

BY MR. GROSSO:

Q. When you first began with Osmomedic, was there one medical doctor that you began with, Mr. Mora?

A. Yes. Dr. Ramirez.

Q. How many TENS units did Dr. Ramirez prescribe for you through Osmomedic?

A. Approximately 80 to 90.

Q. Would Dr. Ramirez sign RX-1 and RX-2 prescription forms?

A. Yes.

Q. When would he sign those?

A. When I had my office he would go once a week to sign it all the patients that he had examined.

Q. Did Dr. Ramirez ever refuse to sign an RX-1 or RX-2 prescription form?

A. yes. Many times he refused patients that did not need the unit.

Q. Did he ever refuse patients because he didn't see the patient?

A. No, because -- no. He would tell me that the person was having a cardiac problem and therefore that unit would be dangerous to their health.

Q. Did Dr. Ramirez -- let me rephrase that question. What else besides TENS units did Dr. Ramirez prescribe?

A. Canes, walkers for diabetes, wheelchairs, beds.

Q. Was there ever a time when Dr. Ramirez did not prescribe something for a patient?

A. Well, when Dr. Ramirez would see that there was no necessity for anything, he would not prescribe.

Q. Who would make that decision?

A. The doctor.

Q. Who would bill for the doctor's visit?

A. He, himself.

Q. Was there ever a trial period?

A. No.

Q. Who would fill out the form?

A. We as salesmen had a demo.

Q. Where did you get that demo from?

A. From a company, Duramedic and Ultimate. I compared both of them and they were exactly the same.

Q. Who in your office would fill out the prescription forms?

A. The salesmen, and when they did not complete it the secretary would.

Q. Would Dr. Ramirez fill out the prescription forms?

A. No. He would sign it and would look at the patient's name who it corresponds with.

Q. Did Dr. Ramirez ever refuse to sign a prescription form . . .

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 90-4088

District Court Docket No. 90-00057-CR-T-15

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NELSON RAMIREZ-GONZALEZ,
BETTY JO BERTONCINI,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PETITION FOR REHEARING

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Appellant, NELSON RAMIREZ-GONZALEZ (RAMIREZ), pursuant to FRAP 40, petitions for rehearing on the decision of this Court affirming his conviction. The decision was rendered on the 24th day of February, 1993, and the convictions of DR. RAMIREZ'S Co-Defendant/Co-Appellant, Dr. Bertoncini were reversed.

In the briefs, it was perhaps not stated as forcefully as it might have been regarding DR. RAMIREZ'S convictions and why it is felt the convictions, notably the conviction for conspiracy (Count One), should be reversed.

In the Indictment, of the 24 overt acts alleged committed by the Defendants, DR. RAMIREZ was only involved in 4 (paragraphs numbered 1, 3, 14 and 15) (R1 1 8-11).

The named Co-Conspirators were Dr. Cruz, Dr. Bertoncini and Mr. Mora. The evidence showed that DR. RAMIREZ had never met or spoken to Dr. Cruz or Dr. Bertoncini. Therefore, the only alleged co-conspirator through whom DR. RAMIREZ could have conspired was Mr. Mora. The Government called Mr. Mora as a witness but he gave no testimony that he ever conspired with DR. RAMIREZ to defraud the Government. Mr. Mora testified under

a plea agreement and his guilty plea had been accepted prior to trial.

The relevant testimony of Mr. Mora is repeated here for the convenience of the Court:

> Q. Did Dr. Ramirez ever refuse to sign an RX-1 or RX-2 prescription form?
>
> A. Yes. Many times he refused patients that did not need the unit.
>
> ***
>
> Q. Was there ever a time when Dr. Ramirez did not prescribe something for a patient?
>
> A. Well, when Dr. Ramirez would see that there was no necessity for anything, he would not prescribe. (R 5 17)

Yet, it was the Government's position (asserted on this appeal as well as below) that because DR. RAMIREZ, inevitably prescribed TENS units for referred patients it was fair to infer that he was part of the alleged conspiracy.

The point is that the testimony of Mr. Mora negated that inference and the jury, in finding DR. RAMIREZ guilty, had to impermissibly pyramid inferences to reach the conclusion of guilt.

The art (or science) of describing a conspiracy is sometimes quite confusing but it is asserted here that this alleged conspiracy

is close in description to that in U.S. v. Fernandez, 892 F.2d 975 (11th Cir. 1990).

In reviewing a conspiracy conviction in that case, this Court stated:

> Accordingly, the evidence of the meeting at Miguel's home shows a discussion susceptible of either an illegal or legal interpretation, and as such cannot be used to establish a conspiracy.
>
> The Government sought to prove a "wheel" conspiracy with Miguel, the hub from which two spokes extended. For a wheel conspiracy to exist, those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single illegal enterprise. Otherwise, the conspiracy lacks "the rim of the wheel to enclose the spoke."

The evidence revealed that DR. RAMIREZ did not know the other doctors charged in the conspiracy and the discussions with Mr. Mora were susceptible of a legal interpretation. DR. RAMIREZ would only see patients referred by Mr. Mora and, when called for, would prescribe TENS units or other equipment.

CONCLUSION

The Court is urged to rehear this appeal and enter an opinion reversing the convictions of DR. RAMIREZ.

Respectfully submitted,